

STATE OF MICHIGAN
SUPREME COURT

BETH HOFFMAN, Personal Representative
of the ESTATE OF EDGAR BROWN, Deceased,

Plaintiff - Appellee,

v

DR. PETER BARRETT,

Defendant - Appellant.

SUPREME COURT

CASE NO:

*Publ opn
3-372*

COA NO: 289011

LC CASE NO: 03-3576-NH

(Calhoun County)

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ok

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DEFENDANT-APPELLANT DR. PETER BARRETT'S
APPLICATION FOR LEAVE TO APPEAL
TO THE SUPREME COURT

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STATEMENT IDENTIFYING THE JUDGMENT APPEALED FROM
AND THE RELIEF SOUGHT

In this medical malpractice wrongful death action, Defendant filed a Motion for Summary Disposition raising numerous issues. The trial court ruled that Plaintiff's Notice of Intent was sufficient, but indicated that Plaintiff's Affidavit of Merit was "woefully defective." The trial court dismissed Plaintiff's Complaint **without prejudice**. On November 10, 2008, an Order was entered pursuant to the trial court's ruling.

On November 19, 2008, Defendant filed a Claim of Appeal. On June 3, 2010, the Court of Appeals issued a published opinion affirming the trial court's dismissal without prejudice. *Hoffman v Barrett*, 288 Mich App 536; 794 NW2d 67 (2010). On July 13, 2010, Defendant filed an Application for Leave to Appeal to the Supreme Court. On November 22, 2010, the Supreme Court issued an Order holding the matter in abeyance pending the decision in *Ligons v Crittenton Hospital* (Supreme Court Docket No: 139978) and *Green v Pierson* (Supreme Court Docket No: 140808).

On October 24, 2011, the Supreme Court issued an Order vacating the Court of Appeals' Opinion and remanding the matter back to the Court of Appeals for reconsideration in light of the Supreme Court's decision in *Ligons v Crittenton Hospital*, 490 Mich 61 (2011), which was decided on July 29, 2011.

The Court of Appeals' previous Opinion was vacated and the matter was remanded back to the Court of Appeals. On March 8, 2012, the Court of Appeals issued a published Opinion affirming the dismissal, without prejudice, finding that the Supreme Court's *Ligons*' decision did not affect its previous decision.

This Court has jurisdiction to decide this Application for Leave to Appeal pursuant to MCR 7.301(A)(2) and MCR 7.302(C)(2)(b).

Defendant-Appellant files this Application for Leave to Appeal contending that the case should have been dismissed with prejudice instead of without prejudice. Defendant-Appellant respectfully requests that this Honorable Court reverse the trial court's decision and the Court of Appeals' published opinion and remand this matter back to the trial court with instructions that the Motion for Summary Disposition be granted and that the case be dismissed **with prejudice**.

**THE COURT OF APPEALS' DECISION IS CLEARLY ERRONEOUS AND
CONFLICTS WITH ANOTHER DECISION OF THE COURT OF APPEALS
AND THE SUPREME COURT**

The Court of Appeals' decision is clearly erroneous and will cause material injustice if Plaintiff is allowed to proceed with a new lawsuit when the previous lawsuit should have been dismissed with prejudice when the trial court found that Plaintiff's Affidavit of Merit was "woefully inadequate." Further, the published Court of Appeals' Opinion is in direct conflict with *Lignons v Crittenton Hospital*, 490 Mich 61; 803 NW2d 271 (2011) and *Weathers-Taylor v Stapish*, unpublished opinion per curiam of the Court of Appeals, issued December 2, 2008 (Docket Nos: 258682, 265511 and 267097).

In this case, the trial court found that Plaintiff's Affidavit of Merit was "woefully inadequate." However, the trial court dismissed the matter without prejudice instead of with prejudice. The Court of Appeals affirmed the trial court's ruling. The Court of Appeals refused to apply the *Lignons* case even after remand by indicating that the Supreme Court's decision in *Waltz v Wyse*, 469 Mich 642; 677 NW2d 813 (2004) is not applicable to this case and, therefore, *Lignons* does not affect its previous decision.

In *Lignons*, this Court determined that the wrongful death savings provision is not tolled when a plaintiff files a Complaint with a defective Affidavit of Merit. *Lignons*, supra at 90. See also, *Weathers-Taylor*, supra (The filing of a Complaint with a defective Affidavit of Merit does not toll the savings provision). However, the Court of Appeals distinguished *Lignons* by indicating that *Waltz* does not apply to this matter pursuant to the *Mullins II* order¹ from the Supreme Court and, therefore, a rationale reading of MCL 600.5852 provides that the statute should have been tolled by the filing of a Complaint and Affidavit of Merit, even if the Affidavit of Merit is found to be defective.

¹ *Mullins v St Joseph Mercy Hospital (Mullins II)*, 480 Mich 948; 741 NW2d 300 (2007).

The Court of Appeals' Opinion is clearly erroneous because whether or not this case fell within the applicable time period identified in *Mullins II* has no bearing on whether the wrongful death savings provision is tolled by a defective Affidavit of Merit. The *Waltz* decision and *Mullins II* order from the Supreme Court addressed whether a plaintiff would receive tolling in the pre-suit period when a Notice of Intent is filed and the plaintiff is relying on the wrongful death savings provision. *Waltz* determined that a plaintiff would not be afforded tolling for the Notice of Intent because the Notice of Intent only tolls the statute of limitations, not the wrongful death savings provision. However, the *Mullins II* order from the Supreme Court indicates that there was a certain time period where plaintiff would be afforded tolling during this pre-suit period with the filing of a Notice of Intent so long as the case was filed after *Omelenchuk v City of Warren*, 461 Mich 567; 609 NW2d 177 (2000) and within 182 days after *Waltz* was decided. The Court of Appeals' Opinion erroneously fails to apply the *Lignons* decision and allows a plaintiff to toll the wrongful death savings provision with the filing of a Complaint and a defective Affidavit of Merit. The *Waltz* decision and the *Mullins II* order did not address whether a defective Affidavit of Merit tolls the wrongful death savings provision. Thus, the Court of Appeals' opinion indicating that *Waltz* does not apply to this case should have no bearing on whether the Affidavit of Merit tolls the savings provision since *Waltz* was addressing whether a Notice of Intent tolls the wrongful death savings provision during the pre-suit period.

The Court of Appeals' opinion in this case is in direct conflict with the *Lignons* decision and the *Weathers-Taylor* unpublished decision. Both of those cases clearly indicate that the wrongful death savings provision is not tolled when the plaintiff files a Complaint with a defective Affidavit of Merit. In this case, the trial court found that Plaintiff's Affidavit of Merit was "woefully inadequate." Therefore, the case should

have been dismissed with prejudice instead of without prejudice. Defendant will suffer material injustice if the case is not dismissed with prejudice because Plaintiff has already filed another lawsuit regarding these allegations. Therefore, if this case would have been dismissed with prejudice, Defendant would not have to defend this subsequent lawsuit when the initial matter should have been dismissed with prejudice.

Further, Defendant alleges that the trial court and Court of Appeals incorrectly decided that Plaintiff's Notice of Intent complied with MCL 600.2912b. Also, Defendant alleges that Plaintiff's expert is not qualified to sign the Affidavit of Merit or render standard of care testimony pursuant to MCL 600.2169. The trial court did not address this issue, but the Court of Appeals determined that the expert was qualified to sign the Affidavit of Merit.

STATEMENT OF QUESTIONS

I. DID THE TRIAL COURT ERR WHEN IT DISMISSED PLAINTIFF'S COMPLAINT WITHOUT PREJUDICE AFTER IT DETERMINED THE AFFIDAVIT OF MERIT WAS DEFECTIVE SINCE A DEFECTIVE AFFIDAVIT OF MERIT DOES NOT TOLL THE SAVINGS PROVISION?

Defendant-Appellant Answers: "Yes"

Plaintiff-Appellee Answers: "No"

Trial Court Answers: "No"

Court of Appeals Answers: "No"

II. DID THE TRIAL COURT ERR IN RULING THAT PLAINTIFF'S NOTICE OF INTENT COMPLIED WITH MCL 600.2912b AND SHOULD THE CASE HAVE BEEN DISMISSED WITH PREJUDICE?

Defendant-Appellant Answers: "Yes"

Plaintiff-Appellee Answers: "No"

Trial Court Answers: "No"

Court of Appeals Answers: "No"

III. IS PLAINTIFF'S EXPERT QUALIFIED TO SIGN THE AFFIDAVIT OF MERIT OR RENDER STANDARD OF CARE TESTIMONY PURSUANT TO MCL 600.2169?

Defendant-Appellant Answers: "No"

Plaintiff-Appellee Answers: "Yes"

Trial Court Answers: "Trial Court did not render an opinion on this issue."

Court of Appeals Answers: "Yes"

STATEMENT OF FACTS

On January 14, 2001, Decedent Edgar Brown fell from the roof of his house onto a cement driveway as he attempted to remove snow accumulation from the roof. As a result, he sustained numerous rib fractures, a punctured lung, and several internal injuries. The decedent was admitted to Battle Creek Health System (BCHS) and to the care of Dr. Barrett. At the time of his admission, Dr. Barrett is and was board certified in general surgery and thoracic surgery. However, since the injuries involved were both pulmonary based, his care and treatment fell under the cardiothoracic specialty. Dr. Barrett immediately inserted a chest tube, which re-inflated the lung. Serial chest x-rays were taken over several days showing continued improvement to the lungs. The decedent subsequently developed an ileus and an NG tube was inserted. At the time of discharge, the decedent was ambulating, eating, passing gas and having bowel movements. The decedent was discharged home on January 24, 2001, to be followed by the visiting nurse. The decedent developed problems at home on January 25, 2001, and EMS was called. The decedent arrested on the way to BCHS where he was pronounced dead.

The Calhoun County Probate Court appointed Beth Hoffman as personal representative of the estate of Edgar Brown on July 27, 2001. (Calhoun County Probate Court No. 2001-198-DE). On March 3, 2003, Beth Hoffman sent a Notice of Intent to Peter Barrett, M.D. (See Exhibit A). Plaintiff subsequently filed a lawsuit against Dr. Barrett and BCHS on October 17, 2003. BCHS was recently dismissed. Along with the Complaint, Plaintiff filed an Affidavit of Merit. (See Exhibit B). Plaintiff alleges that Dr. Barrett did not properly monitor, evaluate or order appropriate diagnostic testing to assess the stability of Mr. Brown prior to discharge from the hospital on January 24,

2001. It is alleged that Defendant's alleged failure to properly treat the decedent ultimately lead to his death on January 25, 2001.

On May 14, 2004 Defendant filed a Motion for Summary Disposition based on Plaintiff's failure to comply with the "savings provision" of MCL 600.5852 pursuant to the Supreme Court's holding in *Waltz v Wyse*, 469 Mich 642; 677 NW2d 813 (2004). Subsequently, the Supreme Court concluded that the decision in *Waltz* did not apply to any cause of action filed after *Omelenchuk v City of Warren*, 461 Mich 567; 609 NW2d 177 (2000) was decided in which the savings expired and within 182 days after *Waltz* was decided. The Supreme Court indicated that all other causes of actions are controlled by *Waltz*. See *Mullins v St Joseph Mercy Hospital*, 480 Mich 948; 741 NW2d 300 (2007). Thus, since this case was on appeal when the Supreme Court issued the order in *Mullins*, and since it fell within the time period identified in the *Mullins* order, the case was remanded to the trial court for further proceedings. (See Exhibit C).

After remand, Defendant filed a Motion for Summary Disposition and brief in support raising numerous issues for dismissal. (See Exhibit D). On August 21, 2008, Defendant filed a reply brief in support of his Motion for Summary Disposition. (See Exhibit E).

Defendant's Motion for Summary Disposition raised numerous issues. First, Defendant argued that the Notice of Intent provided by Plaintiff was defective and did not contain a statement describing the manner in which the alleged breach of the standard of care caused the decedent's death as required by *Roberts v Mecosta County General Hospital(After Remand)*, 470 Mich 679; 684 NW2d 711 (2004) (*Roberts II*). Next, Defendant's motion argued that a defective Notice of Intent does not toll the statute of limitations pursuant to *Boodt v Borgess Medical Center*, 481 Mich 558; 751 NW2d 44 (2008). Defendant also argued that the Affidavit of Merit was defective and did not

comply with the provisions of MCL 600.2912d and that the dismissal was required pursuant to *Scarsella v Pollak*, 461 Mich 547; 607 NW2d 711 (2000). Finally, Defendant argued that Plaintiff's expert was not qualified to sign the Affidavit of Merit nor was he qualified to render standard of care testimony as to Dr. Barrett. Plaintiff's expert is board certified in general surgery. Dr. Barrett is and was board certified in general surgery and thoracic surgery. The injuries involved were pulmonary based, and the care and treatment fell under the thoracic specialty. See MCL 600.2169 and *Woodard v Custer*, 476 Mich 545; 711 NW2d 842 (2006). Thus, since Plaintiff's expert was not qualified to sign the affidavit, the Affidavit of Merit was defective and it renders the filing of the Complaint a nullity. See *Scarsella, supra*; and *Geralds v Munson Health Care*, 259 Mich App 225; 673 NW2d 792 (2003).

On August 25, 2008, oral arguments were held before the Honorable James Kingsley, Calhoun County Circuit Court Judge. (See Exhibit F). The trial court ruled that the Notice of Intent was sufficient, but indicated that the Affidavit of Merit was defective and dismissed the case without prejudice. (See Exhibit F, Pgs. 4-7). In fact, the trial court ruled that the Affidavit of Merit was "woefully inadequate" under the statute. (See Exhibit F, Pg. 4). Furthermore, Plaintiff's counsel agreed that the Affidavit of Merit was defective. (See Exhibit F, Pg. 5). However, the case was dismissed without prejudice. On November 10, 2008, an order was entered pursuant to the trial court's ruling. (See Exhibit G).

On November 19, 2008, Defendant filed a Claim of Appeal. On June 3, 2010, the Court of Appeals issued a published opinion affirming the trial court's dismissal without prejudice. *Hoffman v Barrett*, 288 Mich App 536; 794 NW2d 67 (2010) (See Exhibit H).

On July 13, 2010, Defendant filed an Application for Leave to Appeal to the Supreme Court. On November 22, 2010, the Supreme Court issued an Order holding the matter in abeyance pending the decision in *Lignons v Crittenton Hospital* (Supreme Court Docket No: 139978) and *Green v Pierson* (Supreme Court Docket No: 140808). (See Exhibit I).

On October 24, 2011, the Supreme Court issued an Order vacating the Court of Appeals' Opinion and remanding the matter back to the Court of Appeals for reconsideration in light of the Supreme Court's decision in *Lignons v Crittenton Hospital*, 490 Mich 61 (2011), which was decided on July 29, 2011. (See Exhibit J).

The Court of Appeals' previous Opinion was vacated and the matter was remanded back to the Court of Appeals. On March 8, 2012, the Court of Appeals issued a published Opinion affirming the dismissal, without prejudice, finding that the Supreme Court's *Lignons'* decision did not affect its previous decision. (See Exhibit K).

LEGAL ARGUMENT

I. STANDARD OF REVIEW.

This Court reviews issues involving matters of statutory interpretation and the trial court's decision on a Motion for Summary Disposition *de novo*. *Roberts v Mecosta County General Hospital (After Remand)*, 470 Mich 679, 685; 684 NW2d 711 (2004). The Court also reviews *de novo* a Motion for Summary Disposition pursuant to MCR 2.116(C)(7). *Trentadue v Buckler Lawn Sprinkler*, 479 Mich 378, 386; 738 NW2d 664 (2007). In the absence of disputed facts, the Court also reviews *de novo* whether the applicable statute of limitations bars a cause of action. *Id.*

II. THE TRIAL COURT ERRED WHEN IT DISMISSED PLAINTIFF'S COMPLAINT WITHOUT PREJUDICE AFTER IT DETERMINED THE AFFIDAVIT OF MERIT WAS DEFECTIVE BECAUSE A DEFECTIVE AFFIDAVIT OF MERIT DOES NOT TOLL THE SAVINGS PROVISION.

The plaintiff must file an Affidavit of Merit with the Complaint in order to comply with the medical malpractice statutes. MCL 600.2912d. The Affidavit of Merit must comply with the provisions of MCL 600.2912d. Plaintiff's affidavit does not comply with the requirements of MCL 600.2912d(1).²

The failure to file the appropriate Affidavit of Merit requires dismissal of a Plaintiff's claim. *Scarsella v Pollak*, 461 Mich 547, 607 NW2d 711 (2000). A defective

² [T]he plaintiff in an action alleging medical malpractice . . . shall file with the complaint an Affidavit of Merit **signed by a health professional who the plaintiff's attorney reasonably believes meets the requirements of an expert witness under section 2169.** . . . shall contain a statement of each of the following:

- (a) The applicable standard of practice or care.
- (b) The health professional's opinion that the applicable standard of practice or care was breached by the health professional or health facility receiving the notice.
- (c) The actions that should have been taken or omitted by the health professional or health facility in order to have complied with the applicable standard of practice or care.
- (d) **The manner in which the breach of the standard of practice or care was the proximate cause of the injury alleged in the notice. [Emphasis Added].**

Affidavit of Merit will toll the statute of limitations until it is challenge by Defendants. *Kirkaldy v Rim*, 478 Mich 581; 734 NW2d 201 (2007). **However, the filing of a Complaint and a defective Affidavit of Merit does not toll the savings provision.** See *Ligons v Crittenton Hosp*, 490 Mich 61; 803 NW2d 271 (2011) and *Weathers-Taylor v Stapish*, unpublished opinion per curiam of the Court of Appeals, issued December 2, 2008 (Docket No. 258682, 265511 and 267097) (See Exhibit L).

The causation section must be stated and must describe “the manner in which” the breach caused Plaintiff’s claimed injuries. See *Young v Spectrum Health*, unpublished opinion per curiam of the Court of Appeals, issued May 18, 2006 (Docket No. 259644) (See Exhibit M). While a claimant is not required to ensure that the statements required by the statute are correct, the claimant must make a good faith effort to “set forth (the information) with that degree of specificity which will put the potential defendants on notice as to the nature of the claim against them.” *Roberts II, supra* at 691, 701. The expected level of specificity should be considered in light of the fact that discovery has not taken place. *Id.* The Court further found that the Notice of Intent is functionally the same as the notice-pleading standard required in general civil Complaints and answers where complainants must “contain a statement of the facts” and the “specific allegations necessary reasonably to inform the adverse party of the nature of the claims against it.” *Nationsbanc Mortgage Corp of Georgia v Luptak*, 243 Mich App 560, 566; 625 NW2d 385 (2000), quoting MCR 2.111(B).

In *Young*, the Court found that the only statement of causation was that if the defendant had “recognized and reported the significant cardiac changes in their patient, provided continuing monitoring and observations of their patient, and communicated (her) symptoms to the physician, she would not have experienced the cardiac arrest and died.” *Id.* That statement was found **to be a conclusory assertion containing nothing**

to explain the manner in which defendants' breach caused the decedent's injury. The Court held that plaintiff failed to specify **the manner in which** more adequate monitoring and reporting would have averted the cardiac arrest and death. *Id.*

The *Young* plaintiff filed a Motion for Reconsideration with The Court of Appeals. The Court denied rehearing noting: "Plaintiff's notice alleges that the injury would not have occurred if the enumerated breaches had not taken place. *However, this is not a statement of the manner in which the breaches caused the injury. Rather, this is merely a statement that the breaches caused the injury. The fact of causation is not the manner of causation.*" The Court went on to note that nothing in the notice explained how the breaches caused the injury. (See Exhibit M).

The same reasoning would apply with respect to the Affidavit of Merit in this case. Here, Plaintiff failed to assert the standard of care as to each Defendant or how the standard of care was breached by each Defendant. Plaintiff also did not provide a statement describing how Dr. Barrett's actions or inactions caused Mr. Brown's death. More importantly, there is no statement describing the manner in which Defendant's breach caused decedent's death. The Affidavit of Merit is defective and thus dismissal is required. *Roberts II, supra.*

The trial court agreed with this argument and concluded that Plaintiff's Affidavit of Merit was "woefully inadequate under the statute." (See Exhibit F, Pg. 4). The trial court concluded that the Affidavit of Merit does not provide the information required by the statute. (See Exhibit F, Pgs. 4-5). In fact, Plaintiff's counsel admitted at the motion hearing that the Affidavit of Merit did not provide information that was required by the statute. (See Exhibit F, Pg. 5). Thus, the trial court concluded that the Affidavit of Merit was defective. However, the trial court dismissed the case without prejudice due to the defective Affidavit of Merit.

The failure to file an Affidavit of Merit requires dismissal of a Plaintiff's claim. (See *Scarsella, supra*). The Supreme Court has indicated that a defective Affidavit of Merit will toll the statute of limitations until it is challenged by defendants. See *Kirkaldy, supra*. But, in this case, the two-year statute of limitations is not at issue or applicable. The care and treatment involving Dr. Barrett and the alleged negligence occurred on January 24, 2001. The two-year statute of limitations applicable to those actions would have expired on January 24, 2003. Plaintiff did not file a Notice of Intent until March 3, 2003, after the expiration of the two-year statute of limitations. (See Exhibit A). Thus, Plaintiff invoked and relied upon the savings provision for the filing of this claim. See MCL 600.5852. The personal representative was appointed on July 27, 2001. The savings provision would provide Plaintiff two years from the date the personal representative was appointed to file suit. See MCL 600.5852. **However, the filing of a Complaint and a defective Affidavit of Merit does not toll the savings provision.** See *Ligons, supra* and *Weathers-Taylor v Stapish, supra*.

In *Ligons*, the personal representative of the estate of the deceased patient brought a wrongful death and medical malpractice action against the doctor, the doctor's practice, and the hospital. The Court of Appeals determined that the plaintiff's Notice of Intent was not deficient, but the plaintiff's Affidavit of Merit was deficient as to all three defendants. The Court determined that the wrongful death savings statute could not be tolled with the filing of a Complaint and a defective Affidavit of Merit and that the defective Affidavit of Merit could not be cured after expiration of the savings period. See *Ligons v Crittenton Hospital*, 285 Mich App 337; 776 NW2d 361 (2009).

In *Ligons*, the Court of Appeals acknowledged that the Supreme Court held in *Kirkaldy v Rim*, 478 Mich 581, 585-586; 734 NW2d 201 (2007), the filing of a Complaint and Affidavit of Merit tolls the statute of limitations period until the affidavit is

successfully challenged as invalid. However, the Court in *Kirkaldy* relied on MCL 600.5856(a) to determine that the defective Affidavit of Merit challenges the statute of limitations (as opposed to the wrongful death savings provision) until successfully challenged. In *Lignons*, the Court distinguished *Kirkaldy* by indicating that the wrongful death savings provision, MCL 600.5852, is a savings statute, not a statute of limitations, and, therefore, pursuant to the plain language of the statute, does not toll the running of the wrongful death savings provision if the Affidavit of Merit is defective. See MCL 600.5852 and MCL 600.5856.

The Court of Appeals' decision in *Lignons* was appealed to the Supreme Court and the Supreme Court affirmed the Court of Appeals' decision. See *Lignons v Crittenton Hospital*, 490 Mich 61; 803 NW2d 271 (2011). The Supreme Court concluded that dismissal with prejudice was required:

D. DISMISSAL WITH PREJUDICE WAS REQUIRED

Plaintiff's case was dismissed with prejudice because the two-year statutory limitations period provided in MCL 600.5805(6) for his medical malpractice action expired before his AOMs were deemed defective; therefore, no tolling was available to him upon his filing of the complaint under MCL 600.5856(a). The alleged malpractice by defendants occurred on January 22, 2002. Accordingly, the two-year limitations period expired on January 2, 2004. If the suit had been commenced before January 22, 2004, the limitations period would have been tolled when the complaint was filed with the accompanying AOMs. But no suit was filed within the limitations period, so no tolling was available.

Instead, plaintiff filed suit within the saving period afforded him under MCL 600.5852, which permits the personal representative of the decedent's estate to commence an action "at any time within 2 years after letters of authority are issued although the period of limitations has run" as long as commencement is "within 3 years of the period of limitations has run." Plaintiff was appointed personal representative on February 22, 2005. He had until January 22, 2007 – three years after the two-year period of limitations expired on January 22, 2004 – in which to file suit during the

savings period, because the limitations period had expired, there was nothing left to toll under MCL 600.5856(a) when he filed the complaint even though it was accompanied by AOMs. For these reasons, the Court of Appeals correctly dismissed plaintiff's case with prejudice.

IV. CONCLUSION

Pursuant to the plain and controlling language of MCR 2.110(A), the applicable version of MCR 2.118, MCL 600.5856, MCL 600.2912d, and this Court's decision in *Scarsella, Kirkaldy, and Waltz*, we hold that a defective AOM may not be retroactively amended and that the proper response to a defective AOM is dismissal. Although the timely filing of a defective AOM tolls the limitations period until the court finds the AOM defective, an AOM filed during a saving period after the limitations period has expired tolls nothing, as the limitations period has run and the saving period may not be tolled. In this case, because the limitations period had run before the complaint was filed, plaintiff cannot amend his defective AOMs retroactively. Given that the saving period has expired, plaintiff's case had to be dismissed with prejudice. The judgment of the Court of Appeals is affirmed.

Ligons, 490 Mich at 89-90. (Emphasis added).

In *Weathers-Taylor*, the Court of Appeals also addressed whether the *Kirkaldy* reasoning applies to the wrongful death savings provision. The Court stated, in relevant parts, as follows:

In light of *Waltz*, however, it appears that the filing of a Complaint and defective Affidavit of Merit do not toll the savings period. In *Kirkaldy*, this Court specifically relied on MCL 600.5856(a), which pertains only to statutes of limitation or repose, as recognized in *Waltz, supra* at 650. Also as recognized in *Waltz, supra* at 655, MCL 600.5852 is a savings provision and "not a statute of limitations" or a "statute of repose." Accordingly, reading *Kirkaldy* and *Waltz* together, the filing of a Complaint and Affidavit of Merit tolls the limitation period until there is a successful challenge to the validity of the affidavit. But their filing does not toll the savings period because the savings provision is not a statute of limitations or repose. Thus, it is reasonable to conclude that dismissal without prejudice would be improper if the Ruettinger defendants' substantive

arguments are correct. Consequently, we must examine these arguments. [Emphasis Added]. (See Exhibit L, Pg. 6).

In *Weathers-Taylor, supra*, the Court then examined whether defendants' substantive argument challenging the Affidavit of Merit complied with was correct. In that case, defendants argued that plaintiff's attorney did not reasonably believe that plaintiff's expert met the requirements of MCL 600.2169 and that a proper Affidavit of Merit was not provided by an appropriate expert. The Court rejected defendants' argument regarding the substantive challenge to the Affidavit of Merit. However, the Court clearly indicated that if defendant successfully challenges an Affidavit of Merit in a wrongful death matter, that the filing of a Complaint and a defective Affidavit of Merit does not toll the savings period provided in MCL 600.5852. (See Exhibit L, Pg. 6).

In this case, the trial court has already determined that the substantive argument challenging Plaintiff's Affidavit of Merit was successful. The trial court determined that Plaintiff's Affidavit of Merit did not contain the information required by MCL 600.2912d. In fact, Plaintiff's counsel even acknowledged at the motion hearing that the Affidavit of Merit was defective. Thus, applying the reasoning used by this Court in *Ligons, supra*, the filing of a Complaint and defective Affidavit of Merit does not toll the savings period. Therefore, the trial court and Court of Appeals erred when it dismissed Plaintiff's Complaint without prejudice.

The Court of Appeals refused to apply the *Ligons* opinion even after this Court vacated the Court of Appeals previous decision and remanded the case to the Court of Appeals for reconsideration in light of the *Ligons* decision. The Court of Appeals erroneously concluded that since this case fell within the time period identified in the *Mullins II, supra*, time period, that the *Waltz* rationale did not apply and the savings provision could be tolled by the filing of a Complaint and a defective Affidavit of Merit.

However, the Court of Appeals' misapplies the *Mullins II* order. The *Mullins II* order, and the predecessor cases, were addressing whether the notice tolling provision, MCL 600.5856, tolled the additional period provided for wrongful death savings actions under MCL 600.5852. The *Mullins II* order and the predecessor cases (*Waltz, supra* and *Omelenchuk, supra*) were addressing whether the Notice of Intent would toll the wrongful death savings provision during the pre-suit period. Those cases did not address whether a defective Affidavit of Merit would toll the wrongful death savings provision. Thus, even though this case fell within the time period identified in *Mullins II*, those cases were only addressing whether a plaintiff is afforded tolling for the Notice of Intent during the pre-suit period when the wrongful death savings provision is applicable. They did not address tolling of the wrongful death savings provision when a plaintiff files a Complaint and a defective Affidavit of Merit. The cases which address those specific issues have been *Lignons* and *Weathers-Taylor*. Thus, the *Lignons* opinion was binding on the Court of Appeals and the Court of Appeals erroneously failed to apply it to this case.

Furthermore, in its initial published decision in this case, the Court of Appeals incorrectly states that the Supreme Court's *Waltz* decision was the "transmutation of the extended limitations period and MCL 600.5852 into a "savings provision," which allowed for the savings provision not to be tolled."³ The, *Waltz* decision was not the first Supreme Court decision to indicate that MCL 600.5852 is a savings provision. The Supreme Court previously indicated that MCL 600.5856 is not a statute of limitations, but rather a savings provision in *Miller v Mercy Memorial Hosp*, 466 Mich 196, 199; 644 NW2d 730 (2002). Therefore, even if the Court of Appeals is not applying the *Waltz* decision because of the *Mullins II* order, the Supreme Court's *Miller, supra* decision

³ *Hoffman v Barrett*, 288 Mich App 536, 542; 794 NW2d 67 (2010).

previously indicated that MCL 600.5852 is not a statute of limitations, but rather a savings provision.

Thus, the Court of Appeals erroneously states that MCL 600.5852 is providing a limitation period, since it will not apply *Waltz*, and that this "limitation period" can be tolled by the filing of a Complaint and defective Affidavit of Merit. However, this is contrary to the Supreme Court's previous decision in *Miller*, which had already defined MCL 600.5852 as a savings statute, not a statute of limitations. Therefore, the Court of Appeals has refused to apply the Supreme Court binding precedent.

In this case, Plaintiff filed the Notice of Intent after the expiration of the two-year statute of limitations. Thus, Plaintiff was invoking and relying upon the savings provision. See MCL 600.5852. However, as Plaintiff acknowledged at the motion hearing, the Complaint was filed with a defective Affidavit of Merit. Therefore, the filing of a Complaint with a defective Affidavit of Merit does not toll the savings provision and the time period provided under the savings provision has now expired. See *Lignons, supra*. As a result, the trial court and Court of Appeals erred when it dismissed this matter without prejudice since the applicable filing period provided in the savings provision has already expired⁴. Thus, Plaintiff's Complaint should have been dismissed with prejudice pursuant to *Lignons, supra*.

⁴ In this case, the relevant dates are as follows:

January 24, 2001- Date of alleged malpractice;
July 27, 2001- Personal Representative appointed;
January 24, 2003- Expiration of the two-year statute of limitations;
March 3, 2003 – Plaintiff files Notice of Intent;
October 17, 2003 – Plaintiff files Complaint and defective Affidavit of Merit;
January 24, 2006 – Expiration of the three-year "ceiling" under the wrongful death savings statute.

III. THE TRIAL COURT ERRED IN RULING THAT PLAINTIFF'S NOTICE OF INTENT COMPLIED WITH MCL 600.2912b AND THE CASE SHOULD HAVE BEEN DISMISSED WITH PREJUDICE.

A. Plaintiff's Notice of Intent Does Not Comply with the Provisions of MCL 600.2912b.

A plaintiff must provide a potential defendant with a proper Notice of Intent complying with the provisions of MCL 600.2912b in order to commence a medical malpractice action. See *Boodt v Borgess Medical Center*, 481 Mich 558, 562-564; 751 NW2d 44 (2008). Plaintiff failed to comply with the provisions of §2912b(4) by failing to provide any statement as to "the manner in which" Defendant's breach of the standard of care resulted in the injuries claimed pursuant to §2912b(4)(e) *Roberts II, supra*. Summary disposition was appropriate pursuant to *Boodt, supra* and *Roberts v Mecosta County General Hospital*, 466 Mich 57; 42 NW2d 633 (2002) (*Roberts I*).

In order for a medical malpractice claim or theory to be viable, the potential defendant must receive notice pursuant to MCL 600.2912b as to the alleged claim prior to the filing of the Complaint. Plaintiffs must comply with each of the provisions of MCL 600.2912b and the claim must be filed within the statutory period.⁵

⁵ MCL 600.2912b, in pertinent part, provides:

(1) ... a person **shall not** commence an action alleging medical malpractice against a health professional or health facility unless the person has given the health professional or health facility written notice under this section not less than 182 days before the action is commenced.

...

(4)The notice given to a health professional **or health facility** under this section **shall contain a statement** of at least all of the following:

- (a) The factual basis for the claim.
- (b) The applicable standard of practice or care alleged by the claimant.
- (c) The manner in which it is claimed that the applicable standard of practice or care was breached by the health professional or health facility.
- (d) The alleged action that should have been taken to achieve compliance with the alleged standard of practice or care.
- (e) **The manner in which it is alleged the breach of the standard of practice or care was the proximate cause of the injury claimed in the notice.** [Emphasis added.]

MCL 600.2912b places the burden of complying with the Notice of Intent requirements on the plaintiff and does not implicate a reciprocal duty on the part of the defendant to challenge any deficiencies in the notice before the Complaint is filed. *Roberts I, supra* at 66. MCL 600.2912b(4) sets forth the minimal information to be contained in the notice given to the health professional or health facility, which includes the facts, standard of care, the actions that should have been taken, how the defendant breached the standard of care, **proximate cause**, and the names of those being notified. *Id.* at 65. The use of the word "shall" in MCL 600.2912b(4) denotes mandatory, not discretionary, action. *Id.*

The purpose of the notice requirement is to promote settlement without the need for formal litigation and to reduce the cost of medical malpractice litigation while still providing compensation for meritorious medical malpractice claims that might otherwise be precluded from recovery because of litigation costs. *Neal v Oakwood Hospital*, 226 Mich App 701, 705; 575 NW2d 68 (1997).

In *Roberts I*, the Court held that the statute of limitations could not be tolled under MCL 600.5856(d), "unless notice was given in compliance with all the provisions of MCL 600.2912b." *Roberts I, supra* at 70-71. The Court also held that §2912b imposed no requirements on defendants to object to the sufficiency of plaintiff's Notice of Intent before filing the Complaint." *Id.* at 66-67. In *Roberts II*, the Court decided the issue of whether or not plaintiff's Notice of Intent was deficient pursuant to the requirements of MCL 600.2912b and whether the statute of limitations was tolled. The Court noted that MCL 600.2912b requires a plaintiff to include in the Notice of Intent **a statement** responding to **each** of the provisions, including:

"The manner in which it is claimed that the breach was the proximate cause of the injury claimed in the notice." MCL 600.2912b(4).

Plaintiff's Notice of Intent was defective because it failed to provide adequate notice responding to each of the provisions of §2912b(4) and, thus, the statute of limitations was not tolled. (*Id.* at 702). Failure to provide the required information renders the Notice of Intent defective and did not provide proper notice requiring dismissal of Plaintiffs' claim. *Roberts I, supra* at 70-71.

The Court in *Roberts II* noted that plaintiff's Notice of Intent was not wholly deficient with respect to all of the requirements but that the plaintiff was not in full compliance because plaintiff failed to include a **statement** regarding the "manner in which" it was claimed that each of the defendants breached the standard of care proximately causing the injury. *Roberts II, supra* at 690-702.

When reviewing the proximate cause portion of the Notice of Intent, the *Roberts II* Court stated that the plaintiff failed to offer any statement as to how a breach by the defendant was a proximate cause of the injury. The Court disagreed that an inference could be gleaned that there was a misdiagnosis, which resulted in the fallopian tube bursting thus leading to sterility because that was not stated. Plaintiffs must state what action breached the standard of care and what injuries that action caused. *Id.* at 699.

The *Roberts* Notice of Intent was much more detailed factually so that the reader might be able to infer that a wrong diagnosis was made, that the defendants should have diagnosed an ectopic pregnancy and the failure to diagnose an ectopic pregnancy caused a delay in treatment resulting in a rupture of her fallopian tubes. That was not adequate, however. The Court believed there was **ambiguity as to whether or not it was the delay or the direct treatment that caused** the rupture resulting in sterility. *Id.* The Court held that MCL 600.2912b provided specific subsections and required statements responsive to each subsections to provide proper notice. The notice in the

Roberts case was held to be insufficient to meet the particularized requirements of section 2912b. *Id.* at 701.

In a more recent case, *Boodt, supra*, the Court held that a Notice of Intent that fails to comply with the provisions of MCL 600.2912b does not toll the statute of limitations. In that case, the Court specifically held that plaintiff's failure to include a statement describing "the manner in which it is alleged the breach of the standard of practice or care was the proximate cause of the injury claimed in this notice" was defective and, thus, failed to toll the statute of limitations. The Court noted, as explained in *Roberts II*, "it was not sufficient under this provision to merely state that defendants alleged negligence caused an injury." Rather, §2912b(4)(e) requires a Notice of Intent to more "precisely to contain a statement as to the *manner* in which it is alleged that the breach was a proximate cause of the injury." *Boodt* at 560. Because the Notice of Intent did not toll the statute of limitations in that case, the case was dismissed with prejudice as the statute of limitations had expired. The fact that plaintiff had also filed a Complaint and Affidavit of Merit did not toll the statute of limitations because plaintiff was not allowed to file a Complaint until after plaintiff filed a valid Notice of Intent containing all of the information required under §2912b(4). See *Boodt, supra* at 562-563, citing *Roberts I*, 466 Mich at 64 and *Miller v Malik*, 280 Mich App 687; 760 NW2d 818 (2008).

This case is similar to the Notice of Intent in *Boodt* and *Roberts* and, thus, the trial erroneously denied the Motion for Summary Disposition on this issue. Plaintiff's section on proximate cause merely states "As a proximate result of the Defendant's conduct, Edgar Brown died prematurely from his injuries." (See Exhibit A). This paragraph does not describe "the manner in which" the claimed alleged breach of the standard of care resulted in Plaintiff's injury. A reading of the entire Notice of Intent

fails to provide any information describing what was done or not done and how those actions or inactions caused decedent to die prematurely from his injuries.

Defendant is not required to guess at what claims of negligence plaintiff is asserting against him. *Roberts II* at 698. Notice is required for each defendant even if the claim is only for vicarious liability. *Id* at 693. The Court of Appeals followed the holding of *Roberts II* in *Hartzell v City of Warren* when the Court held that plaintiff must assert a vicarious liability theory in the Notice of Intent and plaintiff must provide the standard of care as it applies to each potential defendant. *Hartzell v City of Warren*, unpublished opinion per curiam of the Court of Appeal, issued, May 10, 2005 (Docket No. 252485). (See Exhibit N).

A plaintiff is required to provide in the notice enough detail to allow the potential defendants to understand the claimed basis of the impending malpractice action even though the claimant is not required ultimately to prove that her statements are correct in the legal sense. The claimant must set forth allegations in good faith and in a manner that is responsive to the specific queries posed by the statute. *Id.*

The Court noted that the standard of care is different for a doctor, nurse, and a health care organization, thus it is wrong to lump the doctors, nurses, and facilities all together when stating the standard of care. The standard of care must be specific as to each profession. If a claim is only for vicarious liability as to one defendant, the notice must state so.

The notice is similar in this case to the notice in *Hartzell* in that the plaintiff never separated the standard of care as it applies to Dr. Barrett, the hospital or the professional corporation. (See Exhibit A). In *Hartzell*, the Court noted that “the specificity required by *Roberts* could have the potential of causing claims with merit to be dismissed based on minor procedural technicalities, such as an attorney’s failure to

specify which standard of care applies specifically to each defendant". *Id.* However, the Court went on to state "the purpose of the notice requirement is to promote settlement without the need for final litigation and reduce the cost of medical malpractice litigation". *Id.* at 12. **Even though the Court felt that the Notice of Intent read as a whole may infer enough information to provide the defendants with enough detail to understand the basis of the impending claim, the Notice of Intent was insufficient under *Roberts* because it did not specify which standards of care were applicable to whom. *Id.***

In this case, the trial court and the Court of Appeals erred in ruling that Plaintiff's Notice of Intent complied with the requirements of MCL 600.2912b. Plaintiff failed to provide the specificity as required by *Roberts* and, thus, the Notice of Intent was insufficient. Therefore, the trial court and the Court of Appeals erred in ruling that Plaintiff's Notice of Intent complied with the statute and the matter should have been dismissed with prejudice because Plaintiff is not allowed to file a Complaint and Affidavit of Merit until Plaintiff has filed a valid Notice of Intent. See *Boodt, supra* and *Miller, supra*. The Plaintiff cannot commence an action before he or she files a Notice of Intent that contains all of the information required under MCL 600.2912b(4) and the period of limitation and/or savings provision has expired and dismissal with prejudice is appropriate. *Id.*

Also, Defendant submits that *Bush v Shabahang*, 484 Mich 156; 772 NW2d 272 (2009) is not applicable to this case because *Bush* dealt with MCL 600.5856(c) as amended by 2004 PA 87, effective April 22, 2004. This case was filed before the amendment to MCL 600.5856 and, thus, the *Bush* holding applying the post-amendment language is not applicable. See *Green v Pierson, unpublished opinion per curiam of the Court of Appeals, Issued February 9, 2010 (Docket No: 289588)* (See Exhibit O).

B. The Time Period To File Has Expired And Dismissal With Prejudice Pursuant To *Boodt* Is Required

A plaintiff in a medical malpractice case must do more than simply file a Complaint. A potential plaintiff must first send a Notice of Intent complying with the provisions of MCL 600.2912b to the prospective defendant at least 182 days before filing a Complaint. *Roberts I, supra* and *Roberts II, supra*. Plaintiff must also file an Affidavit of Merit complying with the provisions of MCL 600.2912d with the Complaint. A valid Complaint must be filed before expiration of the appropriate statute of limitations and/or savings period.

Determination of the appropriate time within which Plaintiff was required to file her lawsuit involves the interplay between MCL 600.5856(d)⁶ and MCL 600.5852.⁷ MCL 600.5856(d) has since been amended and renumbered MCL 600.5856(c), but the amendment occurred after the filing of this lawsuit. Thus, Defendant will refer to MCL 600.5856(d) for purposes of this argument.

MCL 600.5856(d) is the notice tolling provision operating to toll the statute of limitations or repose when a claimant provides valid written Notice of Intent to commence a medical malpractice action, pursuant to MCL 600.2912b, **if the statute of limitations or repose** would otherwise expire during the pre-suit notice period.

⁶ **MCL 600.5856(d) provides:**

The statute of limitations or repose are tolled: (d) If, during the applicable notice period under §2912b, a claim would be barred by the statute of limitations or repose, for not longer than a number of days equal to the number of days in the applicable notice period after the date notice is given in compliance with §2912b.

⁷ **MCL 600.5852 provides:**

If a person dies before the period of limitations has run or within 30 days after the period of limitations has run, an action which survives by law may be commenced by the personal representative of the deceased person at any time within two years after Letters of Authority are issued although the period of limitations has run. But an action shall not be brought under this provision unless the personal representative commences it within three years after the period of limitations has run.

MCL 600.5852 extends the otherwise applicable statute of limitations period for wrongful death actions. Although the statute of limitations itself remains two years, an action alleging wrongful death may be "saved" by the existence of a grace period, which can, at a maximum, amount to an additional three years within which to bring the action. MCL 600.5852 provides that the action must be brought within two years from the date the personal representative is appointed but not longer than three years from when the statute of limitations would otherwise expire. **In this case, MCL 600.5852 required Plaintiff to file a valid Complaint and Affidavit of Merit no later than January 24, 2006, five years after the alleged malpractice.**

In the present case the alleged malpractice occurred on January 24, 2001, the day Decedent was discharged from the hospital. Thus, the 2-year statute of limitations expired on January 24, 2003. See MCL 600.5805(6), MCL 600.5838a and MCL 600.5856. Plaintiff filed the Notice of Intent on March 3, 2003, which was after the 2-year statute of limitations and, thus, was relying on or invoking the savings provision. See MCL 600.5852. Letters of Authority were issued to Beth Hoffman on July 27, 2001, providing a grace period until July 27, 2003. The absolute latest date to file a valid claim is January 24, 2006, more than four years ago. Because Plaintiff failed to file a valid Notice of Intent, the Complaint is invalid and must be dismissed. *Roberts I, supra* at 66. Further, the statute of limitations and/or savings period was never tolled. *Boodt, supra, Miller, supra, and Weathers-Taylor, supra*. The limitation period and savings period has expired and dismissal with prejudice is appropriate.

IV. PLAINTIFF'S EXPERT IS NOT QUALIFIED TO SIGN THE AFFIDAVIT OF MERIT OR RENDER STANDARD OF CARE TESTIMONY PURSUANT TO MCL 600.2169

Defendant raised the issue of whether Plaintiff's expert was qualified to sign the affidavit and render standard of care testimony pursuant to MCL 600.2912d and MCL 600.2169. However, the trial court did not render a decision on this issue. But, the Court of Appeals did address this issue and determined that Plaintiff's expert was qualified to sign the Affidavit of Merit even though he was only board certified in general surgery.

In order to sign an Affidavit of Merit regarding standard of care opinions, Plaintiff's expert must satisfy the requirements of MCL 600.2169 that states in pertinent part:

Sec. 2169. (1) In an action alleging medical malpractice, a person **shall not** give expert testimony on the appropriate standard of practice or care unless the person is licensed as a health professional in this state or another state and meets the following criteria:

- (a) If the party against whom or on whose behalf the testimony is offered **is a specialist**, specializes at the time of the occurrence that is the basis for the action in the same specialty as the party against whom or on whose behalf the testimony is offered. **However, if the party against whom or on whose behalf the testimony is offered is a specialist who is board certified, the expert witness must be a specialist who is board certified in that specialty.** (Emphasis supplied).

The Court of Appeals held that the expert's qualifications must match the defendant's even when signing an Affidavit of Merit. If the qualifications of the affiant do not match those of the named defendant, summary disposition is appropriate.

Geralds v Munson Healthcare, 259 Mich App 225; 673 NW2d 792 (2003).⁸ In *Geralds*, defendant was a board certified emergency medicine specialist. Plaintiff's expert, although specializing in emergency medicine, was not board certified in emergency medicine. Plaintiff's expert had even been the past president of the Board of Emergency Medicine. However, the Court held that it was not reasonable for plaintiff to assume the expert would be qualified to sign the Affidavit of Merit. The expert needed to be board certified in emergency medicine in order to satisfy the requirements of MCL 600.2169.

The Court of Appeals upheld the trial court's granting of a Motion to Strike an expert in 2004. In that case, the defendant was a board certified internal medicine physician with added qualifications in critical care obtained through the American Board of Internal Medicine. Plaintiff's expert was board certified in anesthesiology but had a certificate of added qualification in critical care which he obtained through the American Board of Anesthesia. The Court held that plaintiff's expert was not qualified to testify as to the standard of care pursuant to MCL 600.2169(1)(a) because the expert was not board certified in the same specialty as the named defendant. Plaintiff's expert had to be board certified in internal medicine. *Halloran v Bhan*, 470 Mich 572, 576; 683 NW2d 129 (2004).

Most recently, the Supreme Court rendered its opinion regarding expert witnesses in *Woodard v Custer*, 476 Mich 545; 719 NW2d 842 (2006). Two cases were consolidated for the decision. In case number one, the defendant was a board certified pediatrician with a certificate of special qualification in pediatric critical care medicine

⁸ *Geralds* was overruled by *Kirkaldy v Rim*, 478 Mich 581 (2007), but only to note that a defective Affidavit of Merit would toll the statute of limitations until it was challenged. *Kirkaldy* at 585-586.

and neonatal-perinatal medicine. Plaintiff's expert was a board certified pediatrician with no added certification. Before discovery ended, the trial court denied defendant's Motion for Summary Disposition finding that plaintiff had a reasonable belief that the expert was qualified to sign the Affidavit of Meritorious Defense. However, following discovery, the trial court granted defendant's Motion to Strike, as plaintiff's expert was not qualified to render standard of care testimony under MCL 200.2169. *Id.* at 859. The Court held that the plaintiff could not prove a medical malpractice claim without expert testimony and granted summary disposition. *Id.*

In the second case, the defendant was a board certified internal medicine physician specializing in internal medicine. Defendant's expert was a board certified internal medicine physician specializing in infectious disease. The trial court granted a directed verdict on the basis that plaintiff's expert was not qualified to testify as to standard of care because he devoted a majority of his professional time to infectious disease not general internal medicine. *Id.* at 860.

The Supreme Court held:

1. Plaintiff's expert must match the specialty engaged in by the defendant;
2. If the specialty is capable of obtaining board certification, plaintiff must practice in the same specialty;
3. If defendant specializes in a subspecialty, plaintiff must devote a majority of his professional time to the subspecialty;
4. If a certificate of added qualification is a board certificate, plaintiff must have the same certificate of added qualifications;
5. Plaintiff's expert in case number one, while board certified in pediatrics did not match defendant's certificate of special qualification in pediatric critical care medicine; and,

6. Plaintiff's expert in case number two, while board certified in internal medicine, specialized in infectious disease and thus did not match and was not qualified to render standard of care testimony against a defendant who was board certified in internal medicine and devoted a majority of his practice to general internal medicine.

Id. at 842.

The Court further noted that when a defendant has more than one board certification, the plaintiff's expert must match only the specialty that is relevant for the appropriate standard of care, i.e., the specialty engaged in during the course of the alleged malpractice. *Id.*

Most recently, the issue of expert qualification was decided in *Sessoms v Bay Regional*, unpublished opinion per curiam of the Court of Appeals, decided August 22, 2006 (Docket No. 260516) (See Exhibit P). In that case, defendant was a board certified orthopaedic physician. Plaintiff had two experts sign an Affidavit of Merit. Plaintiff's first expert was board certified in internal medicine and specialized in infectious disease. Plaintiff's second expert was a board certified general surgeon. The case involved the treatment of an infection that developed post-operatively to a fracture site. The Court, relying on *Woodard*, held that if the defendant has received board certification in an area, the plaintiff's expert must have the same board certification. *Id.* at Pg. 5.

This case is directly on point with *Woodard* and the above cases and Plaintiff's expert should be stricken regarding the issue of standard of care. Defendant Peter Barrett, M.D. is a board certified general surgeon and thoracic surgeon. (See Exhibit Q). Because the injuries involved were pulmonary based, the care and treatment provided by Dr. Barrett fell under the thoracic specialty. Plaintiff's expert who signed the Affidavit of Merit is only board certified in general surgeon. (See Exhibit B). The board

certifications do not match as required by MCL 600.2169. Therefore, Plaintiff's expert is not qualified to render standard of care opinions against Peter Barrett, M.D. and is not qualified pursuant to MCL 600.2169 to sign the Affidavit of Merit against Dr. Barrett. Furthermore, Plaintiff was on notice by Defendant's responsive pleadings that Dr. Barrett was a board certified thoracic surgeon specializing in cardiothoracic surgery. Plaintiff's expert and the Affidavit of Merit must be stricken and dismissal with prejudice should be granted. See *Scarsella, supra*.

The Court of Appeals readily admits that a significant portion of the decedent's injuries would fall under the thoracic category. However, the Court of Appeals erroneously concludes that Plaintiff had other injuries that did not fall under the thoracic category and, therefore, Plaintiff did not need an Affidavit of Merit signed by a board certified thoracic surgeon. The Court of Appeals' conclusion is contrary to the *Woodard, supra* Supreme Court decision. The *Woodard* decision indicates that a plaintiff's expert must match the specialty engaged in by the defendant. At the very least, any of the allegations relating to a breach in the standard of care when Dr. Barrett was engaging in matters relating to thoracic surgery required an Affidavit of Merit from a board certified thoracic surgeon to address those allegations. Plaintiff cannot rely on a single Affidavit of Merit to address issues relating to general surgery and thoracic surgery issues since Dr. Barrett is board certified in both specialties. Therefore, the Court of Appeals erred in concluding that Plaintiff's expert was qualified to sign the Affidavit of Merit against Dr. Barrett regarding all allegations.

RELIEF REQUESTED

WHEREFORE, Defendant-Appellant, Dr. Peter Barrett, respectfully requests that this Honorable Court grant his Application for Leave to Appeal for the reasons stated herein and reverse the trial court's order and Court of Appeals' opinion and dismiss this matter with prejudice. In the alternative, Defendant-Appellant requests that this Honorable Court issue an Opinion or Order vacating the Court of Appeals' decision and remanding the matter back to the trial court for entry of an Order Granting Defendant's Motion for Summary Disposition **with prejudice**. Defendant-Appellant also requests any other relief this Honorable Court deems appropriate.

Respectfully Submitted,

Aardema Whitelaw, PLLC

Dated: March 30, 2012



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